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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 215, 225, and 252

RIN 0750-AH89

Defense Federal Acquisition Regulation Supplement: Only One Offer—Further Implementation (DFARS Case 2013-D001)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to further implement DoD policy relating to competitive acquisitions in which only one offer is received, providing additional exceptions, and further addressing requests for data other than certified cost or pricing data from the Canadian Commercial Corporation.

DATES: Effective [Insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the Federal Register at 78 FR 28785 on May 16, 2013, to further implement policy with regard to acquisitions in which only one offer is received and requests for data other than certified cost or pricing data from the Canadian Commercial Corporation. This case is a follow-on to DFARS final rules published in the Federal Register under DFARS Case 2011-D013, Only One Offer (77 FR 39126 on June 29, 2012), and DFARS Case 2011-D049, Contracting with the Canadian Commercial Corporation (77 FR 43470 on July 24, 2012).

II. Applicability

The final rule applies to solicitations (including solicitations for task orders and delivery orders) issued on or after the publication date of the final rule.

III. Discussion and Analysis

No public comments were received. There are only minor editorial changes from the proposed rule that were made in the final rule. Revisions include:

- Renumbering section 12.301(f) subparagraphs due to DFARS baseline changes.
- Correcting, in section 12.301(f), prescription references cited for two provisions: 252.215-7007, Notice of Intent to Resolicit; and 252.215-7008, Only One Offer. Extraneous verbiage was removed from the prescription for 252.215-7004,

Requirement for Submission of Data Other Than Certified Cost or Pricing Data—Modifications—Canadian Commercial Corporation.

- Revising the prescription at 215.371-6 to include a statement that provision 252.215-7007, Notice of Intent to Resolicit, should be included in solicitations for the acquisition of commercial items using Far part 12 procedures. This provision is included in the list at 212.301(f) as being applicable to solicitations for commercial items; however, the prescription at 215.371-6 inadvertently omitted restating applicability of the provision to FAR part 12 solicitations.

- Revising two prescriptions at 215.408(3) to include a statement that the provisions should be included in solicitations for the acquisition of commercial items using FAR part 12 procedures. The provisions are: 252.215-7003, Requirement for Data Other Than Certified Cost or Pricing Data—Canadian Commercial Corporation, and 252.215-7004, Requirement for Data Other Than Certified Cost or Pricing Data—Modifications—Canadian Commercial Corporation. These two provisions are included in the list at 212.301(f) as being applicable to solicitations for commercial items; however, the prescriptions at 215.408(3) inadvertently omitted restating applicability of the provisions to FAR part 12 solicitations.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and is summarized as follows:

This rule further implements DoD policy relating to competitive acquisitions in which only one offer is received, providing additional exceptions, and further addressing requests for data other than certified cost or pricing data from the Canadian Commercial Corporation, especially relating to competitive solicitations when only one offer is received from the Canadian Commercial Corporation. The objective of the rule

is to promote competition and ensure fair and reasonable prices by implementing DoD policy with regard to acquisitions when only one offer is received, including the Canadian Commercial Corporation.

There were no public comments in response to the proposed rule. There were no comments filed by the Chief Counsel for Advocacy of the Small Business Administration.

The final regulatory flexibility analysis for the final rule under FARS case 2011-D013, Only One Offer, was addressed in the Federal Register notice published in the Federal Register (77 FR 39126) on June 29, 2012). With regard to DFARS Case 2011-D049, Contracting with the Canadian Commercial Corporation (77 FR 43470 on July 24, 2012), DoD certified that there was no significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it only impacted Canadian business concerns. The changes proposed in this rule are not expected to impact a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the only changes impacting domestic entities are the added exceptions for architect-engineer services and the 8(a) program, which are more in the nature of a clarification than a change.

- Architect-engineer services are purchased under the Brooks Act. The final rule for Only One Offer was not made applicable to part 36. This rule specifically clarifies that it is inapplicable.
- The final rule for Only One Offer was not made applicable to set-asides under FAR part 19. The final rule specifically excluded small business set-asides and set asides under the HUBZone Program, the Service-Disabled Veteran-Owned Small Business Procurement Program, and the Women-Owned Small Business Program. The 8(a) Program was inadvertently omitted from the list of specific exclusions. In accordance with FAR 19.805-1, an acquisition offered to the SBA shall be awarded on the basis of competition limited to eligible 8(a) firms if two conditions are met: (1) the anticipated total value of the contract exceeds the thresholds at FAR 19.805-1(a)(2); and (2) there must be a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers and that award can be made at a fair and reasonable price.

The final rule imposes no new reporting, recordkeeping, or other information collection requirements. The submission of certified cost or pricing data or data other than certified cost or pricing data is covered in FAR 15.4 and associated clauses in 52.215, OMB clearance 9000-013.

There are no known significant alternatives to the rule that would adequately implement the DoD policy. There is no significant economic impact on a substantial number of small entities.

V. Paperwork Reduction Act

The final rule does not impose any additional information collection requirements that require approval under the Paperwork Reduction Act (5 U.S.C. chapter 35). The submission of certified cost or pricing data or data other than certified cost or pricing data required for negotiation is covered in FAR 15.4 and associated clauses in FAR 52.215, and in OMB clearance 9000-013, Cost or Pricing Data Requirements and Information Other Than Cost or Pricing Data, in the amount of 10,101,684 hours.

List of Subjects in 48 CFR Parts 212, 215, 225, and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 215, 225, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 212, 215, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. Section 212.301 is amended by—

- a. Redesignating paragraphs (f)(xi) through (lxii) as (f)(xiii) through (lxv), respectively;
- b. Adding new paragraphs (f)(xi), (xii), and (xiv); and
- c. Revising newly designated paragraph (f)(xiii).

The additions and revision read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) * * *

(xi) Use the provision at 252.215-7003, Requirements for Submission of Data Other Than Certified Cost or Pricing Data—Canadian Commercial Corporation, as prescribed at 215.408(3)(i).

(xii) Use the clause at 252.215-7004, Requirement for Submission of Data other Than Certified Cost or Pricing Data—Modifications—Canadian Commercial Corporation, as prescribed at 215.408(3)(ii).

(xiii) Use the provision at 252.215-7007, Notice of Intent to Resolicit, as prescribed at 215.371-6.

(xiv) Use the provision 252.215-7008, Only One Offer, as prescribed at 215.408(4).

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PART 215—CONTRACTING BY NEGOTIATION

215.371-3 [Amended]

3. Section 215.371-3 is amended-

a. In paragraph (a), by adding ellipses "..." after the words "reasonable expectation" and before the words "that two or more offerors,", and removing "at one level" and adding "at a level" in its place.;

b. In paragraph (b) introductory text, by removing "215.371-4(b) and adding "215.371-4(a)(3);

c. In paragraph (b)(1), removing "at one level" and adding "at a level" in its place; and

d. In paragraph (b)(2)(i), removing ", in accordance with FAR provision 52.215-20" and removing "FAR 15.403-1(c)" and adding "FAR 15.403-1(b)" in its place.

4. Section 215.371-4 is revised to read as follows:

215.371-4 Exceptions.

(a) The requirements at sections 215.371-2 do not apply to-

(1) Acquisitions at or below the simplified acquisition threshold;

(2) Acquisitions in support of contingency, humanitarian or peacekeeping operations, or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack;

(3) Small business set-asides under FAR subpart 19.5, set asides offered and accepted into the 8(a) Program under FAR subpart 19.8, or set-asides under the HUBZone Program (see FAR 19.1305(c)),

the Service-Disabled Veteran-Owned Small Business Procurement Program (see FAR 19.1405(c)), or the Women-Owned Small Business Program (see FAR 19.1505(d));

(4) Acquisitions of basic or applied research or development, as specified in FAR 35.016(a), that use a broad agency announcement; or

(5) Acquisitions of architect-engineer services (see FAR 36.601-2).

(b) The applicability of an exception in paragraph (a) of this section does not eliminate the need for the contracting officer to seek maximum practicable competition and to ensure that the price is fair and reasonable.

5. Section 215.371-6 is added to read as follows:

215.371-6 Solicitation provision.

Use the provision at 252.215-7007, Notice of Intent to Resolicit, in competitive solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, that will be solicited for fewer than 30 days, unless an exception at 215.371-4 applies or the requirement is waived in accordance with 215.371-5.

215.403-1 [Amended]

6. Section 215.403-1 is amended by—

- a. In second sentence of paragraph (c) (1) (A) (1), removing "price analysis." and adding "price analysis; and" in its place.
 - b. In paragraph (c) (4) (C), removing "215.408(5)" and adding "215.408(3)" in its place.
7. Section 215.408 is amended by—
- a. Revising paragraph (3);
 - b. In paragraph (4) (i), removing "215.371-4(a)(1)" and adding "215.371-4(a)" in its place;
 - c. In paragraph (4) (ii), removing "but that provision will only take effect as specified in 252.215-7008" and adding "if the contracting officer is requesting submission of data other than certified cost or pricing data with the offer" in its place;
 - d. Removing paragraph (5); and
 - e. Redesignating paragraph (6) as paragraph (5).

The revision reads as follows:

215.408 Solicitation provisions and contract clauses.

* * * * *

(3) When contracting with the Canadian Commercial Corporation—

(i) (A) Use the provision at 252.215-7003, Requirement for Data Other Than Certified Cost or Pricing Data—Canadian Commercial Corporation—

(1) In lieu of FAR 52.215-20, Requirement for Data Other Than Certified Cost or Pricing Data, in a solicitation, including

solicitations using FAR part 12 procedures for the acquisition of commercial items, for a sole source acquisition from the Canadian Commercial Corporation that is—

(i) Cost-reimbursement, if the contract value is expected to exceed \$700,000; or

(ii) Fixed-price, if the contract value is expected to exceed \$500 million; or

(2) In lieu of FAR 52.215-20, in a solicitation, including solicitations using FAR part 12 procedures for the acquisition of commercial items, for a sole source acquisition from the Canadian Commercial Corporation that does not meet the thresholds specified in paragraph (3)(i)(A)(1), if approval is obtained as required at 225.870-4(c)(2)(ii); and

(B) Do not use 252.225-7003 in lieu of FAR 52.215-20 in competitive acquisitions. The contracting officer may use FAR 52.215-20 with its Alternate IV, as prescribed at 15.408(1)(3), even if offers from the Canadian Commercial Corporation are anticipated; and

(ii)(A) Use the clause at 252.215-7004, Requirement for Data Other Than Certified Cost or Pricing Data—Modifications—Canadian Commercial Corporation—

(1) In a solicitation, including solicitations using FAR part 12 procedures for the acquisition of commercial items, for a

sole source acquisition, from the Canadian Commercial Corporation and resultant contract that is—

(i) Cost-reimbursement, if the contract value is expected to exceed \$700,000; or

(ii) Fixed-price, if the contract value is expected to exceed \$500 million;

(2) In a solicitation, including solicitations using FAR part 12 procedures for the acquisition of commercial items, for a sole source acquisition from the Canadian Commercial Corporation and resultant contract that does not meet the thresholds specified in paragraph (3)(ii)(A) (1), if approval is obtained as required at 225.870-4(c)(2)(ii); or

(3)(i) In a solicitation, including solicitations using FAR part 12 procedures for the acquisition of commercial items, for a competitive acquisition that includes FAR 52.215-21, Requirement for Data Other Than Certified Cost or Pricing Data—Modifications, or that meets the thresholds specified in paragraph (3)(ii)(A) (1).

(ii) The contracting officer shall then select the appropriate clause to include in the contract (52.215-21 only if award is not to the Canadian Commercial Corporation; or 252.215-7004 if award is to the Canadian Commercial Corporation and necessary approval is obtained in accordance with 225.870-4(c)(2)(ii)); and

(B) The contracting officer may specify a higher threshold in paragraph (b) of the clause 252.215-7004.

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PART 225—FOREIGN ACQUISITION

8. Section 225.870-4 is amended by—

- a. Revising paragraph (c) (2);
- b. In paragraph (c) (3), removing "215.408(5)(i)" and adding "215.408(3)(i)" in its place.

The revision reads as follows:

225.870-4 Contracting procedures.

* * * * *

(c) * * *

(2) The Canadian Commercial Corporation is not exempt from the requirement to submit data other than certified cost or pricing data, as defined in FAR 2.101. In accordance with FAR 15.403-3(a)(1)(ii), the contracting officer shall require submission of data other than certified cost or pricing data from the offeror, to the extent necessary to determine a fair and reasonable price.

(i) No further approval is required to request data other than certified cost or pricing data from the Canadian Commercial Corporation in the following circumstances:

(A) In a solicitation for a sole source acquisition that is—

(1) Cost-reimbursement, if the contract value is expected to exceed \$700,000; or

(2) Fixed-price, if the contract value is expected to exceed \$500 million.

(B) If the Canadian Commercial Corporation submits the only offer in response to a competitive solicitation that meets the thresholds specified in paragraph (c) (2) (i) (A) of this section.

(C) For modifications that exceed \$150,000 in contracts that meet the criteria in paragraph (c) (2) (i) (A) or (B) of this section.

(D) In competitive solicitations in which data other than certified cost or pricing data are required from all offerors.

(ii) In any circumstances other than those specified in paragraph (c) (2) (i) of this section, the contracting officer shall only require data other than certified cost or pricing data from the Canadian Commercial Corporation if the head of the contracting activity, or designee no lower than two levels above the contracting officer, determines that data other than certified cost or pricing data are needed (or in the case of modifications that it is reasonably certain that data other than certified cost or pricing data will be needed) in order to determine that the price is fair and reasonable) (see FAR 15.403-3(a)).

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PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.215-7003 [Amended]

9. Section 252.215-7003 is amended by, in the introductory text, removing "215.408(5)(i)" and adding "215.408(3)(i)" in its place.

10. Section 252.215-7004 is amended—

a. In the introductory text, by removing "215.408(5)(ii)" and adding "215.408(3)(ii)" in its place;

b. By removing the clause date of "(JUL 2012)" and adding "(OCT 2013)" in its place;

c. In paragraph (b) introductory text, by removing "the simplified acquisition threshold" and adding "\$150,000" in its place; and

d. By adding introductory text after the clause date and before paragraph (a) to read as follows:

252.215-7004 Requirement for Submission of Data Other Than Certified Cost or Pricing Data—Modifications—Canadian Commercial Corporation.

* * * * *

This clause, in lieu of FAR 52.215-21, applies only if award is to the Canadian Commercial Corporation.

* * * * *

252.215-7007 [Amended]

11. Section 252.215-7007 is amended by, in the introductory text, removing "215.408(3)" and adding "215.371-6" in its place.

12. Section 252.215-7008 is revised to read as follows:

252.215-7008 Only One Offer.

As prescribed at 215.408(4), use the following provision:

ONLY ONE OFFER (OCT 2013)

(a) After initial submission of offers, the Offeror agrees to submit any subsequently requested additional cost or pricing data if the Contracting Officer notifies the Offeror that—

(1) Only one offer was received; and

(2) Additional cost or pricing data is required in order to determine whether the price is fair and reasonable or to comply with the statutory requirement for certified cost or pricing data (10 U.S.C. 2306a and FAR 15.403-3).

(b) Requirement for submission of additional cost or pricing data. Except as provided in paragraph (c) of this provision, the Offeror shall submit additional cost or pricing data as follows:

(1) If the Contracting Officer notifies the Offeror that additional cost or pricing data are required in accordance with paragraph (a) of this clause, the data shall be certified unless an exception applies (FAR 15.403-1(b)).

(2) Exceptions from certified cost or pricing data. In lieu of submitting certified cost or pricing data, the Offeror may submit a written request for exception by submitting the information described in the following paragraphs. The Contracting Officer may require additional supporting information, but only to

the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable.

(i) Identification of the law or regulation establishing the price offered. If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) Commercial item exception. For a commercial item exception, the Offeror shall submit, at a minimum, information on prices at which the same item or/ similar items have previously been sold in the commercial market that is adequate for evaluating the reasonableness of the price for this acquisition. Such information may include—

(A) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), e.g., wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities;

(B) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market; or

(C) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item.

(3) The Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and the reasonableness of price. For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the Offeror's determination of the prices to be offered in the catalog or marketplace.

(4) Requirements for certified cost or pricing data. If the Offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(i) The Offeror shall prepare and submit certified cost or pricing data and supporting attachments in accordance with the instructions contained in Table 15-2 of FAR 15.408, which is incorporated by reference with the same force and effect as though it were inserted here in full text. The instructions in

Table 15-2 are incorporated as a mandatory format to be used, unless the Contracting Officer and the Offeror agree to a different format.

(ii) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.406-2.

(c) If the Offeror is the Canadian Commercial Corporation, certified cost or pricing data are not required. If the Contracting Officer notifies the Canadian Commercial Corporation that additional data other than certified cost or pricing data are required in accordance with 225.870-4(c), the Canadian Commercial Corporation shall obtain and provide the following:

(1) Profit rate or fee (as applicable).

(2) Analysis provided by Public Works and Government Services Canada to the Canadian Commercial Corporation to determine a fair and reasonable price (comparable to the analysis required at FAR 15.404-1).

(3) Data other than certified cost or pricing data necessary to permit a determination by the U.S. Contracting Officer that the proposed price is fair and reasonable [U.S. Contracting Officer to provide description of the data required in accordance with FAR 15.403-3(a)(1) with the notification].

(4) As specified in FAR 15.403-3(a)(4), an offeror who does not comply with a requirement to submit data that the U.S. Contracting Officer has deemed necessary to determine price reasonableness or cost realism is ineligible for award unless the head of the contracting activity determines that it is in the best interest of the Government to make the award to that offeror.

(d) If negotiations are conducted, the negotiated price should not exceed the offered price.

(End of provision)

252.215-7009 [Amended]

13. Section 252.215-7009 is amended by, in the introductory text, removing "215.408(6)" and adding "215.408(5)" in its place.

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